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No. 88-756

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, ET AL., PETITIONERS

v.

FEDERAL MARITIME COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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1988

QUESTION PRESENTED

Whether the Federal Maritime Commission erred in concluding that certain discriminatory tariff practices by common carriers subject to the Commission's jurisdiction violated the Shipping Acts, even though those practices implemented work preservation agreements valid under the National Labor Relations Act.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	10
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Burlington Truck Lines v. *United States*, 371 U.S. 156 (1962) 7, 12

Canada Dry Corp. v. *NLRB*, 421 F.2d 907 (6th Cir. 1974) 13

Community Television v. *Gottfried*, 459 U.S. 498 1983) 14

Council of North Atlantic Shipping Ass'ns v. *FMC*, 672 F.2d 171 (D.C. Cir.), cert. denied, 459 U.S. 830 (1982) 4, 5

"50 Mile Container Rules"—Implementation by Ocean Common Carriers Serving U.S. Atlantic and Gulf Coast Ports, 21 Shipping Reg. (P & F) 544 (1982) 5, 6

FMC v. *Pacific Maritime Ass'n*, 435 U.S. 40 (1978) 4-5, 9, 14

ICC v. *Delaware, L. & W. R.R.*, 220 U.S. 235 (1911) 11

ICC v. *Railway Labor Executives' Ass'n*, 315 U.S. 373 (1942) 12

Local 1976, United Bhd. of Carpenters & Joiners v. *NLRB*, 357 U.S. 93 (1958) 12, 14

NAACP v. *FPC*, 425 U.S. 662 (1976) 11-12, 13

NLRB v. *International Longshoremen's Ass'n*, 473 U.S. 61 (1985) 2

NLRB v. *International Longshoremen's Ass'n*, 447 U.S. 490 (1980) 2

Pascarell v. *New York Shipping Ass'n*, 650 F.2d 19 (3d Cir.), cert. denied, 454 U.S. 832 (1981) 3

Sea-Land Serv., Inc. and Gulf Puerto Rico Lines, Inc.—Proposed Rules on Containers (Sea Land), 21 F.M.C. 1 (1978) 4

Cases—Continued: Page

Sheet Metal Workers Int'l Ass'n, Local 223 v. *NLRB*, 498 F.2d 687 (D.C. Cir. 1974) 13
United Mine Workers v. *Pennington*, 381 U.S. 657 (1965) 13
United States v. *Borden Co.*, 308 U.S. 188 (1939) 12
United States v. *Lowden*, 308 U.S. 225 (1939) 12
United States Navigation Co. v. *Cunard S.S. Co.*, 284 U.S. 474 (1932) 11

Statutes:

Intercoastal Shipping Act, 1933, 46 U.S.C. 843 *et seq.* ... 2
Interstate Commerce Act, 49 U.S.C. 1 *et seq.* (1976 ed.) .. 11
Maritime Labor Agreements Act of 1980, 46 U.S.C. 801 *et seq.* 2
National Labor Relations Act, 29 U.S.C. 151 *et seq.* 2
§ 8(a)(5), 29 U.S.C. 158(a)(5) 12
§ 8(d), 29 U.S.C. 158(d) 13
§ 8(e), 29 U.S.C. 158(e) 3
Shipping Act, 1916, 46 U.S.C. 801 *et seq.*:
46 U.S.C. 814 ..... 9, 14
Shipping Act of 1984, Pub. L. No. 98-237, 98 Stat. 67 (to be codified at 46 U.S.C. App. 1701 *et seq.*) 2
§ 5(e), 98 Stat. 70-71 (46 U.S.C. App. 1704(e)) 6

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-69a) is reported at 854 F.2d 1338. The opinion of the Federal Maritime Commission (Pet. App. 70a-201a) is unofficially reported at 24 Shipping Reg. (P & F) 411. The opinion of the administrative law judge (Pet. App. 202a-268a) is unofficially reported at 22 Shipping Reg. (P & F) 1660.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 1988. The petition for a writ of certiorari was filed on November 3, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In *NLRB* v. *International Longshoremen's Ass'n*, 473 U.S. 61 (1985) (*ILA II*), and *NLRB* v. *International Longshoremen's Ass'n*, 447 U.S. 490 (1980) (*ILA I*), this Court held that the "Rules on Containers" negotiated between petitioner, the International Longshoremen's Association (ILA), and maritime employers' organizations on the Atlantic and Gulf Coasts, were lawful work preservation agreements under the National Labor Relations Act, 29 U.S.C. 151 *et seq.* In each decision, however, the Court made clear that the validity of the Rules on Containers under the Shipping Acts was not at issue.[1] See *ILA I*, 447 U.S. at 512; *ILA II*, 473 U.S. at 70 n.10. In this case, the Federal Maritime Commission (Commission) held that practices by common carriers implementing the Rules on Containers, as embodied in tariffs filed with the Commission, violated the Shipping Acts, because those practices discriminated against certain shippers and cargo handlers without regard to justifiable transportation considerations. The Commission accordingly enjoined petitioners, the common carriers, from engaging in those practices. The court of appeals unanimously affirmed the Commission's decision. Petitioners, joined by respondent West Gulf Maritime Association, principally contend that the Commission, by striking down the carriers' practices under the Shipping Acts, has impermissibly undermined

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[1] The term "Shipping Acts" refers collectively to the Shipping Act, 1916, as amended by the Maritime Labor Agreements Act of 1980, 46 U.S.C. 801 *et seq.*, the Intercoastal Shipping Act, 1933, 46 U.S.C. 843 *et seq.*, and the Shipping Act of 1984, Pub. L. No. 98-237, 98 Stat. 67 (to be codified at 46 U.S.C. App. 1701 *et seq.*). Congress enacted the 1984 Act while this case was pending before the Commission. The Shipping Act of 1984 superseded the 1916 Act with respect to international trades, but made no substantive changes in the provisions applicable here.

the longshoremen's work preservation rights guaranteed by the National Labor Relations Act.

1. Containers, which are essentially truck trailers that can be detached from chassis and hoisted aboard a ship fully loaded, can be "stuffed" (loaded) or "stripped" (unloaded) either on or off the pier. In negotiating the Rules on Containers, the ILA claimed the stuffing and stripping of containers as equivalent to the dockside handling of breakbulk cargo traditionally performed by longshoremen. Although agreeing not to demand that all containers be stuffed and stripped at the dock, the ILA sought to end the transfer of such work to off-pier freight consolidation facilities that operate with non-ILA labor. The adopted Rules therefore provide that if a carrier-owned or leased container is to be stuffed or stripped within 50 miles of a port by anyone other than the ultimate shipper or consignee at his own plant with his own employees, the work must be performed "only at a waterfront facility by deep-sea ILA labor" (Pet. App. 83a). The Rules also prohibit the carriers from furnishing containers to consolidators, and impose liquidated damages of $1000 per container for any violation of the Rules (*id.* at 84a-86a). *Id.* at 6a-9a.

The ILA and maritime employers' organizations, which represented carriers, negotiated the Rules on Containers in 1968, but the parties were not able to enforce them consistently until 1983. The National Labor Relations Board had concluded that the Rules violated Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e), and had obtained injunctions against implementation of the collectively bargained Rules. See *Pascarell* v. *New York Shipping Ass'n*, 650 F.2d 19 (3d Cir.), cert. denied, 454 U.S. 832 (1981). The ILA and carriers, however, did enforce the Rules for several months in 1981 after this Court's

decision in *ILA I*.[2] As a result, a number of shippers and freight handlers filed complaints against the carriers with the Commission. Those complaints alleged that the carriers, by implementing the Rules, had violated the Shipping Acts. Pet. App. 8a-14a.

2. The Commission responded to those complaints by opening Docket No. 81-11, "*50 Mile Container Rules*" – *Implementation by Ocean Common Carriers Serving U.S. Atlantic and Gulf Coast Ports,* "an investigation naming over 140 carriers as respondents" (Pet. App. 14a). The ILA intervened in order to support the carriers and to defend the implementation of the Rules. An administrative law judge (ALJ) held a lengthy evidentiary hearing, which included testimony regarding labor factors that allegedly justified the Rules. *Id.* at 14a-16a, 225a-226a, 241a-242a.[3]

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[2] Carriers had incorporated those Rules into their tariffs filed with the Commission. The Rules therefore became part of the carriers' terms of contract with cargo shippers and others. Pet. App. 73a.

[3] In 1978, before the Court's decision in *ILA I*, the Commission had an occasion to review the validity of the Rules on Containers under the Shipping Acts. In holding that the Rules, as incorporated in two common carriers' tariffs violated the Shipping Acts, the Commission stated that it did "not view the impact of the National Labor Relations Act as permitting a common carrier to disregard entirely its statutory obligations [under the Shipping Acts] when conducting and resolving labor/management negotiations." *Sea-Land Serv., Inc. and Gulf Puerto Rico Lines, Inc. – Proposed Rules on Containers (Sea Land),* 21 F.M.C. 1, 4.

In *Council of North Atlantic Shipping Ass'ns* v. *FMC*, 672 F.2d 171 (D.C. Cir.), cert. denied, 459 U.S. 830 (1982) (*CONASA*), the court of appeals upheld the Commission's exercise of jurisdiction over the carriers' tariffs incorporating the Rules on Containers. Because petitioners in that case had not briefed the Commission's holding that the tariffs violated the Shipping Acts, the court of appeals declined to reach that issue. 672 F.2d at 179 & n.67. The court of appeals nevertheless remanded the case to the Commission because, during the four years the appeal had been pending, the Court had decided *FMC* v.

Addressing the proper reconciliation of federal labor policy with the requirements of the Shipping Acts, the ALJ concluded (*id.* at 242a) that

> [t]he problem reduces itself to one of how far the ILA may go in its work preservation efforts before it impermissibly intrudes upon the rights of [others] to conduct their business free of any discrimination or prejudice resulting from the efforts of the ILA. The answer lies in balancing the harm done to [others] against the benefits derived by the ILA.

Finding that the record contained insufficient evidence that the Rules on Containers "had any measurable [financial] impact upon [shippers' and freight handlers'] businesses" (*id.* at 243a), the ALJ concluded that the Rules do not violate the Shipping Acts (*id.* at 262a-263a).

3. The Commission reversed, holding that the carriers' tariffs implementing the Rules on Containers are "unreasonable and unjustly discriminatory and therefore violate

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Pacific Maritime Ass'n, 435 U.S. 40 (1978), and *ILA I*, and the court of appeals considered that "[i]n the interests of justice, the [Commission] should have the opportunity to reconsider its previous determination in light of these two decisions" (672 F.2d at 189).

On remand from the court of appeals, the Commission later expanded its investigation to include Docket No. 81-11, and also modified its position regarding the presentation and consideration of labor factors. The Commission made clear that " 'the parties may present evidence and otherwise address the nature and extent of any labor policy consideration which might affect the lawfulness of the Container Rules under the sections of the Shipping Acts here at issue and the remedy to be applied for any violations of such sections . . .' " (Pet. App. 144a (quoting *"50 Mile Container Rules"—Implementation by Ocean Common Carriers Serving U.S. Atlantic and Gulf Coast Ports*, 21 Shipping Reg. (P & F) 544, 846 (1982)). Despite the Commission's expansion of its investigation in Docket No. 81-11, and the lapse of the collective bargaining agreement at issue in the original *CONASA* docket, the court of appeals vacated the Commission's dismissal of that proceeding. That case remains pending before the Commission. Pet. App. 142a-146a, 228a.

the [Shipping Acts]" (Pet. App. 73a-74a).[4]

a. The Commission first addressed the relevance of labor factors to the tariffs' validity under the Shipping Acts. The Commission initially concluded that Congress, in enacting the "tariff matter" exception of the Shipping Act of 1984, Pub. L. No. 98-237, 98 Stat. 72 (to be codified at 46 U.S.C. App. 1704(e)), which otherwise removed maritime labor agreements from the Commission's jurisdiction, had intended "that the Commission should not attempt to weigh 'labor considerations' in deciding the lawfulness of a 'tariff matter' " (Pet. App. 129a). Alternatively, the Commission rejected the argument that labor agreements, such as the Rules on Containers, are factors in determining whether tariffs are reasonable under the Shipping Acts. Applying case law under the Interstate Commerce Act holding that common carriers are not "excused from their statutory obligations on the basis of collective bargaining agreements with their employees" (*id.* at 163a), the Commission declined to consider a labor agreement as an element of reasonableness because that would permit a carrier voluntarily to bargain away statutory common carrier obligations (*id.* at 163a-164a).

In a similar vein, the Commission rejected the ALJ's proposed standard of weighing the benefits of the labor agreement against the economic harms to shipping. That unprecedented standard "would require the Commission to make findings of fact outside its area of expertise and to engage in investigations contrary to the policies of the [Maritime Labor Agreements Act]" (Pet. App. 168a). In

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[4] In an earlier interim report, the Commission concluded that it had jurisdiction over the carriers' tariffs incorporating the Rules on Containers. *"50 Mile Container Rules" – Implementation by Ocean Common Carriers Serving U.S. Atlantic and Gulf Coast Ports*, 21 Shipping Reg. (P & F) 544 (1982); see Pet. App. 136a-138a.

light of the "elemental differences between the national policies represented by the Shipping Acts and the labor laws," the Commission concluded that "any comparison of labor benefits and Shipping Act harm [was] at bottom an illogical and intellectually untenable exercise" (*id.* at 169a).

Finally, the Commission acknowledged its duty to "attempt to reconcile conflicting federal statutes in a manner that gives effect to both" (Pet. App. 171a). The Commission concluded (*ibid.* (footnote omitted)), however, that

> because it is clear that the National Labor Relations Act does not apply to the case before the Commission in either its terms or its underlying policies, there exists only, to borrow from conflicts of law terminology, a "false conflict" that the [Commission] is not obliged to resolve by attempting to blend the two bodies of law.

The Commission thus remained "convinced that there is no reasonable or feasible methodology by which we can seek to accommodate 'labor interests' without abandoning our fundamental Shipping Act obligations" (*id.* at 171a-172a). Accordingly, the Commission held that the tariffs incorporating the Rules on Containers would be "judged according to Shipping Act standards normally applicable to such tariffs" (*id.* at 172a). Following *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156 (1962), the Commission agreed to apply labor factors in devising an appropriate remedy for Shipping Acts violations (Pet. App. 172a).[5]

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[5] As the Commission explained (Pet. App. 75a):

> We believe that our responsibility to take "labor considerations" into account is limited to ensuring that an appropriate remedy for violations of the Shipping Acts is drawn no more broadly than necessary, so as to avoid any unwarranted impact on the legitimate collective bargaining interests of the carriers and the union.

b. Reviewing the evidence in the record, the Commission found that "the Rules on Containers place restrictions on the ability of defined classes of shippers to utilize the full range of services offered by off-pier * * * consolidators, warehousemen and freight forwarders" (Pet. App. 185a). The Commission further found that those restrictions are "not justified by transportation circumstances properly cognizable under the Shipping Acts and are arbitrary and unfair" (*ibid.*). In sum, the Commission held that the Rules "create unreasonable disadvantages to shippers within the 50-mile zone who wish to employ their off-pier cargo facilities and to companies operating such facilities, in violation of [the Shipping Acts]" (*ibid.*).

Turning to the appropriate remedy, the Commission ordered carriers to "cease and desist" from publishing the Rules on Container in tariffs and from enforcing the Rules. The Commission delayed for 90 days the effective date of its order "in order to give the carriers a reasonable amount of time to conform their collective bargaining arrangements with the requirements of the shipping laws" (Pet. App. 75a). As the Commission explained, that remedy "serves the public interest and will avoid any unnecessary disruption of the collective bargaining process by giving the parties ample time to accommodate the ILA's interests in some manner other than the present Rules on Containers" (*id.* at 192a).

4. The court of appeals denied the petitions for review, holding that the Commission properly considered labor policies only at the remedial phase of the proceeding under the Shipping Acts.[6] The court of appeals first re-

[6] The court of appeals also upheld the Commission's jurisdiction over the carriers' tariffs incorporating the Rules on Containers (Pet. App. 17a-30a). Furthermore, the court of appeals affirmed the Commission's ruling that, when only transportation conditions are considered, the tariffs are unreasonable and discriminatory under the

viewed prior decisions construing the Shipping Acts, including *FMC* v. *Pacific Maritime Ass'n*, 435 U.S. 40 (1978),[7] and rejected petitioners' argument that those decisions required the Commission to consider labor factors when assessing the validity of the carriers' tariffs (Pet. App. 32a-37a). Decisions such as *Pacific Maritime Ass'n*, in the court of appeals' view, offered little guidance in determining the relevance of labor factors to the Commission's review of carriers' tariffs.[8]

Turning to the interplay between the Shipping Acts and federal labor laws, the court of appeals agreed with the Commission that this case presented a " 'false conflict' " because the Commission's decision "in no way undermined rights guaranteed in or the policies underlying the labor laws" (Pet. App. 57a). The National Labor Relations Act promotes the collective bargaining process and requires negotiation over such matters as work preservation. Federal labor laws, however, do not require employers to accede to union demands for work preservation and do not "guarantee [employees] a substantive right to preserve * * * work" (*id.* at 58a). The court of appeals thus pointed out that "[i]t is not the national labor policy to allow otherwise unlawful activity merely because an employer

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Shipping Acts (*id.* at 30a-31a). Petitioners do not seek review of those aspects of the court of appeals' judgment.

[7] In *FMC* v. *Pacific Maritime Ass'n*, 435 U.S. 40, 50 (1978), the Court held that "national labor policy" did not require exempting collective bargaining agreements from the filing requirements of Section 15 of the Shipping Act, 1916, 46 U.S.C. 814, but that the Commission, in deference to that policy, may exempt certain collective bargaining agreements from those requirements.

[8] The court of appeals similarly rejected the Commission's conclusion that Congress, in enacting the Maritime Labor Agreements Act of 1980, intended to foreclose altogether the Commission's consideration of labor factors (Pet. App. 37a-40a).

and a union have agreed to it in mandatory collective bargaining" (*ibid.*). In other words, the Commission's requiring adherence to the employers' common carrier obligations under the Shipping Acts "does not nullify the rights of the ILA or the carriers under the [National Labor Relations Act]" (*ibid.*).

Finally, the court of appeals rejected petitioners' contention that the Shipping Acts incorporate " 'labor factors' " in the calculus whether carrier practices are unreasonable or discriminatory (Pet. App. 60a). The Shipping Acts primarily protect shippers against discriminatory practices, and courts have construed parallel provisions of the Interstate Commerce Act to preclude carriers from using labor agreements to justify such practices. In light of that overarching statutory objective, together with the accepted practice under the Interstate Commerce Act, the court of appeals concluded that the Commission's refusal to consider labor policy here was reasonable. *Id.* at 60a-62a.

ARGUMENT

The decision of the court of appeals is correct. It does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

1. Petitioners (Pet. 9-11), joined by respondent West Gulf Maritime Association (Br. 10-12, 16-19), principally contend that the Commission, by striking down the carriers' practices under the Shipping Acts, has impermissibly undermined the longshoremen's work preservation rights guaranteed by the National Labor Relations Act. Petitioners, however, do not (and cannot) challenge the Commission's ruling (Pet. App. 172a-189a), affirmed by the court of appeals (*id.* at 30a-31a), that the carriers' prac-

tices implementing the Rules on Containers violate the Shipping Acts, absent a mandated accommodation of federal labor policy. By their terms, the Rules on Containers require carriers to discriminate among shippers on the basis of "a proprietary financial interest (other than in the transportation or physical consolidation or deconsolidation) in the * * * cargo" (*id.* at 65a). Such discrimination would clearly violate the Interstate Commerce Act, 49 U.S.C. 1 *et seq.* (1976 ed.). *E.g., ICC* v. *Delaware, L. & W. R.R.*, 220 U.S. 235, 252-254 (1911). And, given the similar policies underlying that Act and the Shipping Acts, namely, protecting small shippers against carrier practices that favor competing larger shippers, both the Commission and the court of appeals quite correctly construed the Shipping Acts as prohibiting discrimination based upon the proprietary interest in the cargo. See *United States Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 474, 481 (1932).[9]

Contrary to petitioners' suggestion, the Commission need not condone violations of the Shipping Acts merely because federal labor law sanctions (but, of course, does not require) the underlying conduct. To be sure, a regulatory agency may consider employees' interests where that factor would promote the objectives of the agency's organic statute. See *NAACP* v. *FPC*, 425 U.S. 662, 666-

[9] As this Court recognized in *ICC* v. *Delaware, L. & W. R.R.*, 220 U.S. 235, 243-244 (1911), and the Commission found in this case (Pet. App. 173a-174a), freight consolidators, the parties disadvantaged by the carriers' practices under the Rules on Containers, play an indispensable role in helping shippers of small loads achieve some degree of transportation cost parity with the larger shippers. Discrimination against consolidators, therefore, will inevitably disadvantage the smaller shippers. For those reasons, respondent West Gulf Maritime Association's passing suggestion (Br. 12-13) that the Shipping Acts do not explicitly prohibit the carriers' discrimination conduct is meritless.

669 (1976); *ICC* v. *Railway Labor Executives' Ass'n,* 315 U.S. 373, 376-377 (1942); *United States* v. *Lowden,* 308 U.S. 225, 232-238 (1939). In this case, however, the carriers' practices, which the ILA defends, plainly violate the Shipping Acts and would undermine the regulatory scheme's central antidiscrimination policy if permitted to continue. Under such circumstances, the Court had made clear that an agency has no obligation to redefine its statutory requirements in order to accommodate employees' rights under federal labor law. *E.g., Burlington Truck Lines* v. *United States,* 371 U.S. 156, 166-174 (1962); *Local 1976, United Bhd. of Carpenters & Joiners* v. *NLRB,* 357 U.S. 93, 109-111 (1958).[10]

2. This Court has long recognized as "a cardinal principle of construction that * * * [w]hen there are two acts upon the same subject, the rule is to give effect to both if possible." *United States* v. *Borden Co.,* 308 U.S. 188, 198 (1939). The court of appeals correctly recognized that there is no irreconcilable conflict between the antidiscrimination provisions of the Shipping Acts and the statutory right of labor unions to bargain for work preservation agreements. Carriers can readily comply with both the Shipping Acts' prohibition against discrimination among shippers and the National Labor Relations Act's call for bargaining in good faith with employees (29 U.S.C. 158(a)(5)), because federal labor law explicitly provides

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[10] Contrary to respondent West Gulf Maritime Association's contention (Br. 10-12), the court of appeals' decision does not conflict with *Burlington Truck Lines* v. *United States,* 371 U.S. 156 (1962). In that case, the Court concluded that the Interstate Commerce Commission, in choosing a remedy for carriers' violations of the Interstate Commerce Act, should avoid creating unnecessary tension between the labor and shipping obligations of the carriers. See *id.* at 172-174. That is precisely the standard the court of appeals applied to the Commission's decision here. See Pet. App. 41a, 50-53a.

that the obligation to bargain "does not compel either party to agree to a proposal," 29 U.S.C. 158(d). In other words, if an employer may lawfully reject a union's proposal on economic grounds, he may certainly reject a proposal on legal grounds, *i.e.*, the proposal's requiring the employer to engage in unlawful conduct. See *United Mine Workers* v. *Pennington*, 381 U.S. 657, 665 (1965) (duty to bargain "does not mean that the agreement reached may disregard other laws").[11] Manifestly, the labor laws were not intended to empower private persons to amend or partially repeal other Acts of Congress by mere contractual agreement. In sum, the Commission's ruling, even if viewed as precluding parties from bargaining for work preservation agreements that would violate the Shipping Acts, will not undermine federal labor policy.

3. Finally, petitioners renew their contention (Pet. 12-15) that the Commission must consider the union's interest in work preservation in determining the "reasonableness" of the carriers' tariffs under the Shipping Acts. As the Court has observed, the use of phrases like "just and reasonable" and "public interest" in regulatory statutes "is not a broad license to promote the general public welfare. Rather, the words take meaning from the purposes of the regulatory legislation" (*NAACP* v. *FPC*, 425 U.S. at 669). Ultimately, the agency's duties derive from its organic statute and "an agency's general duty to enforce the public interest does not require [the agency] to

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[11] Petitioners mistakenly rely (Pet. 10) on cases such as *Sheet Metal Workers Int'l Ass'n, Local 223* v. *NLRB*, 498 F.2d 687, 697 (D.C. Cir. 1974), and *Canada Dry Corp.* v. *NLRB*, 421 F.2d 907, 910 (6th Cir. 1974). In those decisions, the court of appeals treated the legality of work preservation agreements solely under the National Labor Relations Act. The courts had no occasion to consider the legality of such agreements under other statutory schemes and did not at all suggest that labor agreements need not comply with other laws.

assume responsibility for enforcing legislation that is not directed at the agency * * *." *Community Television* v. *Gottfried*, 459 U.S. 498, 510-511 n.17 (1983).

As the court of appeals recognized, the Shipping Acts primarily protect shippers against discriminatory practices (Pet. App. 60a). An agency may not "abandon an independent inquiry into the requirements of its own statute and mechanically accept standards elaborated by another agency under a different statute for wholly different purposes." *Local 1976, United Bhd. of Carpenters & Joiners* v. *NLRB*, 357 U.S. at 111. Here, the Commission reasonably concluded that labor interests should not be considered in reviewing the carriers' actions under the Shipping Acts because to do so would effectively permit a carrier voluntarily to bargain away statutory common carrier obligations (Pet. App. 163a-164a). The court of appeals thus correctly upheld the Commission's refusal to "abandon[ ] [its] fundamental Shipping Act obligations" (Pet. App. 171a-172a).[12]

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[12] The cases cited by respondent West Gulf Maritime Association (Br. 16 n.17) are not to the contrary. Those decisions involved traditional transportation considerations such as port discrimination and the carrier's right to recover for increased costs. See Pet. App. 163a-164a. None of those decisions considered labor factors in determining whether practices were lawful under Shipping Acts.

Similarly, respondent West Gulf Maritime Association (Br. 14-15) mistakenly contends that the court of appeals' decision conflicts with *FMC* v. *Pacific Maritime Ass'n*, 435 U.S. 40 (1978). In that case, the Court held that "national labor policy" did not require exempting collective bargaining agreements from the filing requirements of Section 15 of the Shipping Act, 1916, 46 U.S.C. 814, but that the Commission, in deference to the policy, may exempt certain collective bargaining agreements from those requirements. 435 U.S. at 53-60, 63. In resolving the issue surrounding the Commission's jurisdiction, however, the Court had no occasion to address whether the Commission should apply labor factors in determining the existence of substantive violations of the Shipping Acts.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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